ROSNELI KUNDOR

v.

KELANTAN STATE ECONOMIC DEVELOPMENT CORPORATION

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
PAJAN SINGH GILL JCA
RAHMAH HUSSAIN JCA
[CIVIL APPEAL NO: D-02-492-97]
20 SEPTEMBER 2004

LABOUR LAW: *Employment - Secondment - Employer seconded employee to subsidiary company - Legality of secondment - Subsidiary company established only after letter of secondment was issued to employee - Whether there were elements of malice - Whether employee justified in refusing to obey secondment order - Whether employee justified in considering herself constructively dismissed - Whether employee justified in refusing to return to work although secondment was revoked*

This was an appeal by the appellant against the decision of the learned judge who dismissed her application, *inter alia*, for a declaration that her dismissal was null and void and for a reinstatement to her original position in the respondent company. It was the appellant's case that the respondent had by its conduct and actions repudiated the contract of employment with her by reason of which she had regarded herself as being unlawfully dismissed from the respondent's employment. The primary issue was in respect of the legality of her secondment to a holding company called Kelrest. The learned judge held that although the respondent had breached the contract of employment by seconding her to Kelrest, the respondent had acted in honest belief that it had such a right to do so, and that there was no malice on its part as alleged by the appellant. Further, the learned judge found that the appellant had contradicted herself when she failed to return to work after the respondent had revoked the letter of secondment and then prayed for a reinstatement to her original position in her application to the court. The learned judge also found that since the appellant was paid her full salary for the month of December 1995 despite her absence from office for that month and a full bonus for the year 1995, the respondent had not by its conduct repudiated the contract. Apart from the above it was argued whether the appellant was dismissed by the

respondent within the meaning of art. 135(2) of the Federal Constitution. The appellant submitted that she was a member of the public service because she was subjected to the terms and conditions similar to public servants.

Held (allowing the appeal):
Per Mokhtar Sidin delivering the judgment of the court

[1] The appellant's appointment letter was not from the Public Service Commission of the State of Kelantan. The letter of offer came from the Kelantan State Economic Development Corporation, a body incorporated. The appellant did not adduce any other evidence to show that she was a member of the public service of the State of Kelantan. Therefore, the appellant was not a public servant within the meaning of art. 132 of the Federal Constitution and as such she could not seek the protection given under art. 135 thereof. However, she could resort to the common law for protection. (p 505 b-d)

[2] When the letter of secondment dated 30 September 1995 was issued to the appellant, Kelrest was not yet a subsidiary of the respondent. Kelrest only became a subsidiary of the respondent on 22 December 1995. Therefore, there was no secondment. In fact, it was submitted that when the appellant went to the Kelrest office, she was only given a chair and a table and nothing else. There was no supporting staff. Implicitly, the respondent wanted to get rid of the appellant as soon as possible even though Kelrest was not yet established. If it was a genuine secondment for the benefit of all parties, the respondent could have easily waited until Kelrest became a subsidiary of the respondent. The facts and the various letters tendered by the appellant of her complaints against some of the officers of the respondent showed elements of malice with the secondment order. Further, the appellant had been with the respondent for some thirteen years. To be seconded resulted in humiliation and frustration and loss of esteem amongst her fellow employees. In the circumstances, she was justified in refusing to obey the secondment order, and when her request to be reinstated to her original post was refused, she was justified in considering herself as constructively dismissed. (p 508 a-g)

[3] The appellant did not respond to the letter dated 4 December 1995 revoking the secondment and did not report to work thereafter because by then she had considered herself dismissed. That was the right thing for her to do. Had she accepted and reported for work with the respondent, then she could

not have considered herself dismissed on 2 December 1995. Whatever happened after that was of no consequence and might be a matter of mitigation on the part of the respondent. (pp 509 e & 511 f)

[4] In a constructive dismissal case, there is no formal letter of dismissal by the employer. The employee has to establish that he has been constructively dismissed by the employer because of some unlawful action by the employer that makes it unbearable for him to continue working with the employer. The appellant in the present appeal had established that when she refused to be seconded to another company as ordered by the respondent. If she had accepted the offer to work after receiving the letter revoking the secondment her claim for being dismissed could not be upheld. (pp 511 h & 512 a-b)

[5] The learned judge erred in finding that the appellant had contradicted herself when she did not return to work but applied for a reinstatement to her original position in her application to the court. It is normal and usual for an aggrieved party to pray for an order that he be reinstated to the original post and rank with the same salary and benefits. Without this prayer, there is no justification for his claim to be wrongfully dismissed. This relief will be coupled with an alternative claim for damages *in lieu* of reinstatement. It is up to the court to decide which of the two reliefs to be given. The whole idea of asking for reinstatement to the original position is to justify that the dismissal was unlawful and that he is willing to work. In the present case, once the learned judge found that the appellant was justified in refusing to go on secondment to Kelrest, he should have granted the reliefs sought by the appellant. (p 512 c-f)

[Damages to be assessed by senior assistant registrar until date appellant was gainfully employed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh perayu terhadap keputusan yang arif hakim kerana menolak permohonannya, antara lain, untuk deklarasi bahawa pembuangan kerjanya adalah tak sah dan batal dan bahawa beliau harus dikembalikan ke jawatan asalnya di syarikat responden. Adalah menjadi kes perayu bahawa responden, melalui tindakan dan kelakuannya, telah menolak kontrak pekerjaan di antara mereka, yang berakibat beliau menganggap dirinya sebagai telah dibuang kerja tanpa sebab dan alasan yang sah. Isu utama adalah berkait dengan kesahan peminjaman perayu ke sebuah syarikat yang dikenali sebagai Kelrest. Yang arif hakim memutuskan bahawa walaupun responden telah melanggar kontrak pekerjaan apabila meminjamkan perayu ke Kelrest, responden bertindak dengan kepercayaan ikhlas bahawa ia berhak berbuat demikian dan

dengan itu tidak wujud sebarang niat jahat di pihak responden seperti yang didakwa. Selain itu, yang arif hakim mendapati bahawa perayu bertindak secara yang bertentangan, apabila beliau enggan kembali bekerja setelah surat peminjaman ditarik balik oleh responden tetapi sebaliknya menuntut supaya dikembalikan ke jawatannya. Yang arif hakim juga mendapati bahawa oleh kerana perayu telah dibayar gaji penuh bagi bulan Disember 1995 walaupun beliau tidak bekerja pada bulan itu, serta diberi bonus penuh bagi tahun 1995, maka responden tidak boleh dikatakan sebagai telah menolak kontrak pekerjaan melalui kelakuannya. Hujah juga telah dikemukakan sama ada perayu telah buang kerja dalam erti kata fasal 135(2) Perlembagaan Persekutuan. Perayu berhujah bahawa beliau adalah seorang anggota perkhidmatan awam kerana jawatannya tertakluk kepada syarat dan terma yang serupa seperti dalam perkhidmatan awam.

Diputuskan (membenarkan rayuan):
Oleh Mokhtar Sidin HMR menyampaikan penghakiman mahkamah

[1] Surat perlantikan perayu tidak datang dari Suruhanjaya Perkhidmatan Awam Negeri Kelantan. Surat tawaran datangnya dari Perbadanan Kemajuan Ekonomi Negeri Kelantan, sebuah perbadanan. Perayu tidak mengemukakan apa-apa bukti lain bahawa beliau adalah anggota perkhidmatan awam Kerajaan Negeri Kelantan. Oleh itu, perayu bukanlah seorang penjawat awam seperti yang dimaksudkan fasal 132 Perlembagaan Persekutuan dan kerana itu tidak boleh menuntut perlindungan di bawah fasal 135 di situ. Perayu bagaimanapun boleh mencari perlindungan di sisi common law.

[2] Apabila surat peminjaman bertarikh 30 September 1995 dikeluarkan kepada perayu, Kelrest belum lagi menjadi syarikat subsidiari responden. Kelrest hanya menjadi subsidiari responden pada 22 Disember 1995. Oleh itu, tidak wujud sebarang peminjaman. Malah, ianya dihujahkan bahawa apabila perayu pergi ke pejabat Kelrest beliau hanya diberikan sebuah meja dan sebuah kerusi, manakala kakitangan sokongan langsung tidak ada. Adalah nyata bahawa responden ingin menghalau perayu secepat yang mungkin walaupun Kelrest masih lagi belum ditubuhkan. Jika ia suatu peminjaman yang tulen dan untuk manfaat semua pihak, responden sepatutnya boleh menunggu sehingga Kelrest menjadi subsidiarinya. Fakta serta surat-surat yang dikirim oleh perayu kepada beberapa pegawai responden berkaitan bantahannya terhadap peminjaman menunjukkan elemen niat jahat pada perintah peminjaman. Selain itu, perayu sudah berkhidmat dengan responden selama tiga belas tahun. Dipinjamkan bermakna kekecewaan, hilang maruah

dan hilang hormat di kalangan kakitangan-kakitangan lain. Dalam keadaan sedemikian, perayu berjustifikasi untuk tidak mematuhi perintah peminjaman, dan bila permohonannya untuk dikembalikan ke jawatan asalnya ditolak, beliau berhak untuk menganggap dirinya sebagai telah dibuang kerja secara konstruktif.

[3] Perayu tidak bertindak atas surat bertarikh 4 Disember 1995 yang membatalkan peminjaman dan tidak melapor diri untuk bertugas kerana ketika itu beliau sudah menganggap dirinya telah dibuang kerja. Tindakan beliau itu adalah sesuatu yang betul. Sekiranya beliau menerima dan melapor diri untuk bertugas, beliau tidak lagi boleh menganggap dirinya telah dibuang kerja pada 2 Disember 1995. Apa yang berlaku selepas itu tidak penting dan hanya merupakan perkara mitigasi di pihak responden.

[4] Dalam suatu kes pembuangan kerja konstruktif, tidak wujud sebarang surat pembuangan kerja secara rasmi dari pihak majikan. Pekerja perlu membuktikan bahawa ia telah dibuang kerja secara konstruktif akibat dari tindakan-tindakan majikannya yang menyebabkan beliau tidak lagi tahan untuk terus berkeja dengan majikannya itu. Ini telah dibuktikan oleh perayu apabila beliau enggan dipinjamkan oleh responden ke syarikat lain. Jika beliau menerima tawaran untuk bekerja selepas menerima surat yang membatalkan peminjaman, tuntutan beliau kerana dibuang kerja tidak boleh dipertahankan.

[5] Yang arif hakim silap kerana mendapati perayu telah bertindak secara bertentangan apabila beliau tidak kembali bekerja tetapi meminta untuk dikembalikan kepada jawatan asalnya dalam permohonannya ke mahkamah. Adalah biasa bagi seseorang yang terkilan sebegitu untuk memohon dikembalikan ke jawatan asal dengan gaji dan manfaat yang sama. Tanpa permohonan itu, tiada justifikasi bagi tuntutan kerana dibuang kerja. Relif tersebut juga dicantumkan dengan tuntutan alternatif untuk gantirugi sebagai ganti pengembalian, dan terpulanglah kepada mahkamah mana satu relif yang perlu dibenarkan. Idea sebenar menuntut pengembalian kepada jawatan asal adalah untuk menjustifikasi bahawa pembuangan kerja adalah tak sah dan bahawa pekerja itu masih bersedia untuk bekerja. Dalam kes semasa, sebaik yang arif hakim mendapati bahawa perayu berjustifikasi untuk enggan dipinjamkan ke Kelrest, beliau harus membenarkan relif yang dipohon oleh perayu.

Gantirugi dinilai oleh Penolong Kanan Pendaftar sehingga tarikh perayu mendapat kerja.]

Case(s) referred to:
Hj Ariffin v. Government of Pahang [1969] 1 MLJ 8 ***(refd)***
Ramalingam Muthusamy v. Chong Kim Fong [1978] 1 MLJ 83 ***(refd)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(foll)***

Legislation referred to:
Federal Constitution, arts. 132(1), 133, 135(2)
Industrial Relations Act 1967, ss. 20(1), 52
Rules of the High Court 1980, O. 15 r. 16,

For the appellant - B Lobo (Yeap & Ramdhari); M/s Lobo & Assoc
For the respondent - Wan Mohd Zuhdi Wan Abdullah; M/s Rithauddeen & Aziz

[Appeal from High Court, Kota Bharu; Originating Summons No: 24-243-1996]

Reported by Usha Thiagarajah

JUDGMENT

Mokhtar Sidin JCA:

The appellant is an accountant and on 1 July 1982 she joined the service of the respondent as an accountant and subsequently was appointed to the post of Pengurus Kewangan. By a letter dated 30 October 1995, the respondent seconded the services of the appellant to a holding company called Kelrest Holdings Bhd (hereinafter referred to as "Kelrest" only). The terms and conditions of the secondment are set out in the appendix to the said letter. The appellant did not agree to the secondment and she stated this in her letter dated 1 November 1995 addressed to the Ketua Eksekutif of the respondent. The respondent insisted on the secondment which the appellant refused. As a result the appellant was issued with a show cause letter by the respondent on why disciplinary action ought not to be taken against her and she was given fourteen days to reply.

In her reply, the appellant stated that for any secondment it is necessary to have the prerequisite consent of the officer concerned. The appellant did not consent to the secondment and as such she is entitled to reject the secondment. The respondent expressed its disagreement in its letter dated 4 December 1995 and advised her to return to work. The respondent on the same day wrote to the appellant revoking the secondment to Kelrest and she was eventually transferred to the post of Pengurus Perancangan Strategik & Kawalan *vide* transfer order dated 5 December 1995.

According to the appellant, the respondent had by its conduct and actions repudiated the contract of employment and by reason of the same, the appellant had regarded herself as being unlawfully dismissed from the employment of the respondent. The appellant then instituted the present action by way of originating summons seeking a declaration that her dismissal was null and void and that for all intents and purposes she is still in the employment of the respondent and is entitled to all benefits and privileges under the employment.

The High Court dismissed her claim with cost. Being dissatisfied with that decision the appellant appealed to this court. We have allowed the appeal earlier and now we give our reasons for doing so.

Before us, the learned counsel for the appellant submitted that the cause of action is based on the common law of master and servant. It relates to wrongful dismissal as against unjust dismissal under s. 20(1) of the Industrial Relations Act 1967. The relief sought in the present appeal is under O. 15 r. 16 of the Rules of the High Court. The appellant did not seek relief under the Industrial Relations Act 1967 because s. 52 of that Act precludes her from doing so. For that reason the Industrial Relations Act 1967 is not applicable.

The learned counsel further submitted that the learned trial judge found that the appellant was right in refusing to go on secondment. In his judgment the learned judge stated:

> The defendant argued, based on the said clause the plaintiff could be posted to any post as the defendant deems fit including to a company in which the defendant has an interest. Kelrest is one such company. It is, therefore, wrong for the plaintiff to object to the secondment. On the strength of clause 2(f), the defendant contended that no prior consent of the plaintiff is necessary to give effect to such a secondment. With respect, I disagree with the defendant. In my opinion the words "di mana-mana tempat" as appearing in clause 2(f) could not be given such a broad interpretation, they should be given their natural and ordinary meaning. Adopting this approach, it appears to me that what clause 2(f) seeks to provide is that the plaintiff may be posted to any place (tempat) as the defendant may, at its discretion, decide but such posting should only be confined to within its own organization. In other words, the said paragraph did not permit the defendant to second the plaintiff to Kelrest which is a different legal entity. If the defendant chooses to do so then it has, first of all, to seek the consent of the plaintiff, without which it would be of no effect and force.

This proposition of law found support in the case of *Nokes v. Doncaster Amalgamated Collieries, Ltd.* [1940] AC 1014. In that case Viscount Simon LC observed at p. 1020:

> It will be readily conceded that the result contended for by the respondents in this case would be at complete variance with a fundamental principle of our common law – the principal, namely, that a free citizen, in exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent.

I am of the view that the secondment of the plaintiff was in breach of the contract of employment and the common law right of an employee as stated by Viscount Simon in the above case. Given those breaches it is, however, necessary to consider the circumstances in which the defendant had committed them. "A mere honest misapprehension especially if open to correction, will not justify a charge of repudiation". (See *Ross Symth & Co., Ltd. v. Bailey, Son & Co. Ltd.* [1940] 3 All ER 60, per Lord Wright at p. 72.

There is no appeal against this finding by the learned trial judge in respect of this. As such we take it that the finding of the learned judge was right. As such the respondent cannot now say that it has the right to transfer the appellant to Kelrest.

The learned counsel for the appellant submitted that breach of a "fundamental" principle of contract goes to the root of the contract and discharges the contract entitling the appellant to claim a wrongful (constructive) dismissal by the respondent. Before us, the learned counsel for the appellant raised several issues. Before proceeding with those issues we have requested the parties to address us as to whether Kelrest in actual fact is a subsidiary of the respondent. The parties were given time to look into this matter.

When the parties came back with the necessary information on Kelrest, the following facts were established: Kelrest was only registered on 17 August 1995 with RM2 paid-up capital. The shareholders were Tan Sri Dato' Abdul Aziz Abdul Rahman and Wan Zulkifle Wan Yusoff where each held RM1 share. The shares were increased by RM750,000 only on 22 December 1995 whereupon the shares were allotted to the respondent. This change was only registered on 21 January 1996. It is clear that only on 22 December 1995 that Kelrest became a subsidiary of the respondent. The letter seconding the appellant to Kelrest was dated 30 October 1995. Thus when the letter of secondment was issued Kelrest was not a subsidiary of the respondent but a registered company with RM2 capital. It could not be a secondment at all and in our view the appellant was correct in refusing to ignore the letter dated 30 October 1995.

The learned judge was correct in his conclusion as we have stated above. We would add further the letter of secondment dated 30 October 1995 was not a secondment at all but a transfer to a totally different company which at that time had no connection whatsoever with the respondent. It is also noted that at the material time Kelrest was only a RM2 paid-up capital company. According to the affidavit of Hanifa bin Ahmad affirmed on 17 July 2003, on behalf of the respondent, an extraordinary general meeting of Kelrest was held on 22 December 1995 to pass the resolution to allot 750,000 shares of RM1 each to the respondent. On 28 November 1995, the first budget of the company was approved and amongst that to purchase office furniture and equipments and also budget allotted for administration. In our view, at the time when the secondment order was issued to the appellant on 30 October 1995, not only Kelrest was not the subsidiary of the respondent but also had no capability of paying the salary of the appellant. The genuineness of the secondment order was totally suspect. As such it would not be out of place for the appellant to allege that the secondment order was tainted with malice.

Arising from that the first issue whether the appellant had been "dismissed" by the respondent within the meaning of art. 135(2) of the Constitution, the learned counsel for the appellant submitted that the appellant was a member of the public service because she was subjected to the terms and conditions similar to the public servants.

Who are the members of the public service? This issue had been decided in *Ramalingam s/o Muthusamy v. Chong Kim Fong* [1978] 1 MLJ 83. In that case it was held that officers of the Federal Land Development Authority are not public officers within the meaning of O. 43 r. 5(2) of the Rules of the Supreme Court 1957. Public services under the Interpretation Act means the public services mentioned in art. 132(1) of the Federal Constitution which sets out a list of public services. However, the Federal Land Development Authority is not one of the services mentioned in the Constitution. Ajaib Singh J (as he then was) at p. 85 stated:

> Thus there remained four issues to be determined in this matter. First whether under Order 43 rule 5(2) of the Rules of the Supreme Court the consent of the Minister of Finance was necessary before any property in the hands of the garnishees could be seized. Here I agree with Mr. Ramachandran that the officers of the Federal Land Development Authority are not public officers within the meaning of Order 43 rule 5(2) which states that if property liable to seizure by garnishment notice is in the custody or under the control of any public officer in his official capacity then such property shall be so seized only with the consent in writing of the Minister of Finance in the case of a Federal Officer or the Menteri Besar or Chief Minister in the case of a State

Officer. Under section 3 of the Interpretation Act 1967 a public officer is a person lawfully holding, acting in or exercising the functions of a public office and public office itself is defined in the Act as an office in any of the public services. Public services under the Interpretation Act means the public services mentioned in Article 132(1) of the Federal Constitution. Article 132(1) of the Federal Constitution sets out a list of public services but the Federal Land Development Authority is not one of the services mentioned therein. Sections 64 and 65 of the Land Development Ordinance 1956 referred to by Mr. Kulasegaran in support of his contention on this point were irrelevant and inapplicable in determining the question in issue. Under these two sections all members, officers and servants of the Federal Land Development Authority are no doubt public servants within the meaning of the Penal Code and are afforded protection under the provisions of the Public Authorities Protection Ordinance 1948 but they do not by virtue thereof become public officers within the meaning of Order 43 rule 5(2) of the Rules of the Supreme Court.

From the above it could be seen that public servants are those in the public services listed out in art. 132(1) of the Federal Constitution. Article 132 provides:

Public services

132 (1) For the purposes of this constitution, the public services are:

(a) the armed forces;

(b) the judicial and legal service;

(c) the general public service of the Federation;

(d) the police force;

(e) (Repealed);

(f) the joint public services mentioned in Article 133;

(g) the public service of each State; and

(h) the education service.

(2) (Not relevant).

(2A) Except as expressly provided by this Constitution, every person who is a member of any of the services mentioned in paragraphs (a), (b), (c), (d), (f) and (h) of Clause (1) holds office during the pleasure of the Yang di-Pertuan Agong, and, except as expressly provided by the Constitution of the State, every person who is a member of the public service of a State holds office during the pleasure of the Ruler or Yang di-Pertua Negeri.

(3) (Not relevant)

(4) (Not relevant).

Article 133 of the Federal Constitution provides:

Joint services etc.

133. (1) Joint services, common to the Federation and one or more of the States or, at the request of the States concerned, to two or more States, may be established by federal law.

(2) Where a member of any of the public services is employed:

(a) partly for federal purposes and partly for State purposes; or

(b) for the purposes of two or more States,

the proportion, if any, of his remuneration payable by the Federation and the State or States concerned or, as the case may be, by each of the States concerned, shall, subject to federal law, be determined by agreement or, in default of agreement, by the Commission whose jurisdiction extends to him."

Only the above categories of members of the public services are protected by art. 135 of the Federal Constitution which provides:

Restriction on dismissal and reduction in rank

135 (1) No member of any of the services mentioned in paragraphs (b) to (h) of Clause (1) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank;

Provided that in its application to members of the services mentioned in paragraph (g) of Clause (1) of Article 132 this Clause shall not apply to any law which the legislature of any State, other than Penang and Malacca, may make to provide that all powers and functions of a Public Service Commission of such State, other than the power of first appointment to the permanent or pensionable establishment, be exercised by a Board appointed by the Ruler of such State:

And provided further that this Clause shall not apply to a case where a member of any of the services mentioned in this Clause is dismissed or reduced in rank by an authority in pursuance of a power delegated to it by a Commission to which this Part applies, and this proviso shall be deemed to have been an integral part of this Clause as from Merdeka Day.

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

(The proviso is not relevant).

(3) (Not relevant).

In the present appeal, the learned counsel for the appellant contended the appellant was a member of the "public service" of the State of Kelantan. The only reason given that she was a member of the public service was because she was a permanent and pensionable officer of the State Economic Development Corporation (SEDC) Kelantan. He then cited the decision in *Haji Ariffin v. Government of Pahang* [1969] 1 MLJ 8. The learned counsel submitted that the appellant was a member of the public service because she was subjected to terms and conditions applicable to an officer of a public service as contained in the letter dated 23 June 1982. Paragraph (2)(c) of the letter stated as follows:

2. Tawaran jawatan ini adalah tertakluk kepada syarat-syarat yang berikut di bawah iaitu:

…

(e) Tuan/puan adalah setiap masa tertakluk kepada Perintah-perintah Perbadanan, Pekeliling-pekeliling dan lain-lain Perintah Pentadbiran dikeluarkan dari masa kesemasa mengenai kerja, kelakuan dan syarat-syarat perkhidmatan pegawai-pegawai dalam Perkhidmatan Awam.

(f) Tuan/puan boleh ditugaskan berkhidmat di mana-mana tempat yang diarahkan oleh Perbadanan.

…

3. Jawatan yang ditawarkan ini adalah tetap dan berpencen.

Based on that offer the appellant's counsel submitted that since the post was permanent and pensionable, the case of *Haji Ariffin v. Government of Pahang* [1969] 1 MLJ 8 applies. We have gone through the decision and we could not find anything in that judgment which supports the proposition by the appellant's counsel. He cited the following passages in the judgment of Raja Azlan Shah J (His Majesty as he then was) at pp. 9 and 10:

With a view to deciding the last ground it is desirable to refer briefly to the Federation Constitution. The English common law rule comprehensively expressed in the Latin expression "*durante bene placito*" (during pleasure) has not been adopted in its entirety in this country. The harsh results of the common law have been mitigated by constitutional provisions designed to improve the position of public servants. Art. 132(2A) has, subject to exceptions expressly provided by Federal and State Constitutions, adopted the English common law that every person who is a member of the public service of the Federal or of a State Government holds office during the pleasure of the Yang di-Pertuan Agong or the Ruler or Governor as the case may be. The express exceptions are clearly embodied in art. 135 which put a check on the unabridged exercise of pleasure. The pleasure of the Yang di-Pertuan Agong, or the Ruler or Governor, would still be there, but it has to be exercised in accordance with the statutory obligations of art. 135, and it is the breach of these obligations that afford a cause of action. If the termination of service does not violate the provisions of art. 135, this court is not competent to quash an order terminating the service under item 1 of the First Schedule to the Court of Judicature Act, 1964.

Art. 135 therefore gives two-fold protection to persons who come within that article: (1) against dismissal or reduction in rank by an authority subordinate to that which, at the time of dismissal or reduction, has power to appoint a member of that service of equal rank; and (2) against the dismissal or removal without giving them a reasonable opportunity of being heard. It is to be observed that the article applies only to members of any of the services mentioned in paragraphs (b) to (g) of clause (1) of art. 132 and that includes "members of the public service of a State". Although the Laws of the Consitution of Pahang do not provide exceptions to the doctrine *durante bene placito* embodied in art. 132(2A), the lacunae has been supplemented by the express provisions of art. 135. In other words, for art. 135(2) to apply in the present case the plaintiff must in the first instance be a member of the public service of the Government of the State of Pahang. Secondly, he must have been dismissed from service by way of punishment. In the latter case, if the employer exercises his right under the conditions and terms of service and does not terminate his service by order of dismissal by way of punishment, then art. 135 has no application.

I am of the view that although the plaintiff did not come under the umbrella of the State Public Services Commission, *vide* Public Services Commission (Extension of Jurisdiction) Enactment, 1958, he was nevertheless by virtue of his employment a member of the public service of the State and therefore came within the purview of art. 135. The disciplinary authority for this officer was the State Secretary: see regulation 31, Cap. D, General Orders.

From the above decision it is clear to us that the public servant stated in that case was a public servant because he was a member of the public service of the State of Pahang.

Turning to the present appeal, the appellant's counsel relied solely on the appointment letter dated 23 June 1982 which stated that the post was "permanent and pensionable". It is clear to us that the appointment letter was not from the Public Service Commission of the State. The letter of offer came from the Kelantan State Economic Development Corporation, a body incorporated. The appellant did not adduce any other evidence to show that the appellant was a member of the public service of the State of Kelantan.

For the above reasons, we hold that the appellant is not a public servant within the meaning of art. 132 of the Federal Constitution and as such she could not seek the protection given under art. 135 of the Federal Constitution.

Even though art. 135 of the Federal Constitution is not available to protect the appellant, that does not mean that the appellant is without protection. In our view, the common law protection is still available to the appellant as stated by the learned trial judge in the court below. In his judgment the learned judge stated:

> This brings me to the question of the legality of the secondment which, in my view, is crucial to this case. The secondment was purportedly made pursuant to clause 2(f) of the contract which reads as follows:
>
> 2(f) Tuan/puan boleh ditugaskan berkhidmat di mana-mana tempat yang diarahkan oleh Perbadanan.
>
> The defendant argued, based on the said clause the plaintiff could be posted to any post as the defendant deems fit including to a company in which the defendant has an interest. Kelrest is one such company. It is, therefore, wrong for the plaintiff to object to the secondment. On the strength of clause 2(f), the defendant contended that no prior consent of the plaintiff is necessary to give effect to such a secondment. With respect, I disagree with the defendant. In my opinion the words "di mana-mana tempat" as appearing in clause 2(f) could not be given such a broad interpretation, they should be given their natural and ordinary meaning. Adopting this approach, it appears to me that what clause 2(f) seeks to provide is that the plaintiff may be posted to any place (tempat) as the defendant may, at its discretion, decide but such posting should only be confined to within its own organization. In other words, the said paragraph did not permit the defendant to second the plaintiff to Kelrest which is a different legal entity. If the defendant chooses to do so then it has, first of all, to seek the consent of the plaintiff, without which it would be of no effect and force.

This proposition of law found support in the case of *Nokes v. Doncaster Amalgamated Collieries, Ltd.* [1940] AC 1014. In that case Viscount Simon LC observed at page 1020:

> It will be readily conceded that the result contended for by the respondents in this case would be at complete variance with a fundamental principle of our common law – the principal, namely, that a free citizen, in exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent.

I am of the view that the secondment of the plaintiff was in breach of the contract of employment and the common law right of an employee as stated by Viscount Simon in the above case. ….

We are of the view that the learned judge had stated the principle correctly and came to the correct conclusion when he said the respondent was in breach of the contract of employment. Apparently, both parties especially the respondent accepted the conclusion by the learned trial judge since there was no appeal against that.

We agree with the learned judge that the secondment order given to the appellant was in breach of the contract of employment of the appellant and that the appellant has every right to refuse to comply with the said order.

After holding that the respondent was in breach of the contract of employment the learned trial judge went on to consider whether the respondent had repudiated the contract of employment. In his judgment the learned judge stated as follows:

> The defendant in its affidavit in reply and submission before me asserted that it has the right to second the plaintiff to Kelrest pursuant to clause 2(f) of the contract. To substantiate its claim the defendant contended that it has been the practice of the defendant to second its officers to companies wholly owned or controlled by the defendant pursuant to a similar clause. I have not doubt that the defendant here had acted in the honest belief that it has such a right under the contract, though as it turned out, it was misconceived. The plaintiff further contended that the defendant's conduct of seconding her to Kelrest was actuated by malice because the defendant was not happy with the report (RK 2) submitted by the plaintiff regarding various alleged "malpractices and/or irregularities" committed by certain officers of the defendant.
>
> The defendant denied the plaintiff's allegation and stated that the secondment was part and parcel of the defendant's corporate reorganization exercise which involved the secondment of a large section of the defendant's officers to companies wholly owned or controlled by the defendant. Kelrest is a wholly

owned holding company of the defendant. The plaintiff's secondment to Kelrest was at the request of the General Manager of Kelrest through his letter of 28th September 1995 (MA 2). Thus, I find there is no convincing evidence to support the plaintiff's contention. There may well be suspicion as to the true motive behind the secondment but suspicion alone is not enough. There has to be compelling evidence to support the plaintiff's allegation. What happened here is in clear contrast to that is found in the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 on which the plaintiff had placed much reliance. In that case, Salleh LP (as he then was), in delivering the judgment of the Supreme Court, made the following observation with regard to the motive of the employer:

> Thus in our judgment the transfer, which relegated the applicant to a position of lesser responsibilities, albeit on the same terms and conditions of service, which transfer the applicant refused to accept, is a dismissal. It clearly shows that the appellant company was displeased with the appellant but it also exhibited the respondent's company's intention not to be bound by the contract any longer. Such relegation of responsibility with its consequential humiliation and frustration and loss of estimation amongst his fellow employees made it impossible for the appellant to carry on being employed under the respondent company's organization. In other words, he had been driven out of his employment. This is therefore a dismissal.

I don't think one could say the same thing in relation to the present case.

It is here that we have to disagree with the views of the learned trial Judge. Before hearing the appeal both parties filed several affidavits. It is in one of the affidavits that we discovered the true state of affairs of the company, Kelrest. This evidence is found in the "afidavit lanjutan" deposed by Hanifa bin Ahmad on 17 July 2003. This affidavit was filed at our request to show the relationship between the respondent and Kelrest. In the affidavit it is shown as exh. HA3 the incorporation of Kelrest issued by the Registrar of Companies. In that exhibit it is shown that Kelrest was incorporated only on 17 August 1995. It was not disclosed in that affidavit who were the shareholders. Anyway, in the "afidavit jawapan lanjutan" deposed by the appellant on 21 July 2003, it was disclosed that the paid-up capital of Kelrest as at 4 September 1995 was RM2 allotted to two individuals and not the respondent (see exh.t HA2). It was only on 22 December 1995 the paid-up capital of Kelrest was increased by RM750,000 and the 750,000 shares were allotted to the respondent and this was duly registered with the Registrar of Companies on 26 January 1996.

As can be seen from the above, Kelrest became a wholly-owned subsidiary of the respondent only on 22 December 1995 and not earlier. According to the evidence as exhibited the post of Pengurus Besar appeared to come into being only on 28 November 1995 (exh. HA6). The letter requesting for the secondment was dated 28 September 1995 (p. 129 of the appeal record). Further, in that letter it was stated that Kelrest Holdings Bhd was incorporated on 1 August 1995. This could not be true because the certificate issued by the Registrar of Companies shows that Kelrest was only incorporated on 4 September 1995. The letter directing the appellant to be seconded to Kelrest was dated 30 October 1995. There could not be a secondment because Kelrest became a wholly-owned subsidiary of the respondent only on 22 December 1995. In fact, in the course of the submission it was stated that when the appellant went to Kelrest's office she was given a chair and a table and nothing else. There was no supporting staff. We could not help but feel that the respondent wanted to get rid of the appellant as soon as possible even though Kelrest was not established yet. If it was a genuine secondment for the benefit of all parties, the respondent could easily wait until Kelrest was actually established and became a wholly-owned subsidiary of the respondent.

Taking those facts together and the various letters tendered by the appellant of her complaints against some of the officers of the respondent, we are of the view that there were elements of malice with the secondment order. The appellant had been with the respondent some thirteen years and suddenly she was seconded to a company which was supposed to be a wholly-owned subsidiary of the respondent. For that reason we are of the view that the observation of Salleh Abas, LP (as he then was) in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 applies to the present appeal. Further, we are of the view that the appellant's secondment resulted with consequential humiliation and frustration and loss of estimation amongst her fellow employees.

For the reasons we have stated above the appellant was justified in refusing to obey the secondment order. When the appellant's request to be reinstated to her original post which was refused, the appellant was justified in considering herself to be constructively dismissed as stated in her letter dated 2 December 1995 (p. 112 of the appeal record). The dismissal was to take effect immediately, ie, on 2 December 1995.

That was not the end of the story because on 4 December 1995, the respondent by a letter written by the Ketua Eksekutif Kumpulan (p. 114 of the appeal record) revoked the letter of secondment dated 30 October 1995. The learned trial judge, in respect of this revocation, stated as follows:

> What perplex me most is the apparent contradiction between the stand she took in refusing to return to work and her present application in which one of the relief prayed for is for reinstatement to her original position as Pengurus Kewangan. In the first place it must be realized by the plaintiff that nobody, be it in the service of the government or its statutory body, could claim any right to any office. Every officer is subject to being transferred to any post within the same scheme of service at the absolute discretion of the government or the statutory body, as the case may be. Therefore, it is not open to the plaintiff, as she did here, to ask this Court to reinstate her to any particular position. Had she honestly wanted to continue in employment with the defendant she could have done so on being asked to return to work by the defendant. She may have been transferred to another post but then there was no evidence that the new post is lower in rank than that of Pengurus Kewangan. There is, I think, no room for her to complain. She had been given ample opportunity by the defendant to return to work and was paid the full salary for the month of December 1995 despite her absence from office effectively for the whole month of December 1995. A full bonus for the year 1995 was also paid to the plaintiff. All these conduct on the part of the defendant go to show that there was no intention at all on the part of the defendant to have the plaintiff's services prematurely terminated.

With the greatest respect to the learned judge, we are of the view that he had missed the whole purpose of the appellant considering herself to be dismissed. First of all, we have to consider whether the appellant was effectively dismissed on the date she considered herself to be dismissed, ie, on 2 December 1995. If it is so, then whatever happened after that was of no consequence and may be a matter of mitigation on the part of the respondent. In the present appeal, the evidence is so obvious that secondment of the appellant was without her consent and was unlawful giving the appellant no right to refuse the secondment. Before the dismissal on 2 December 1995, the appellant requested to be placed in her former post of Pengurus Kewangan which the respondent refused. Before the secondment order the appellant had made several complaints of some unhealthy activities by some officers of the respondent and it was alleged by her that, that was the reason she was seconded to Kelrest. When she refused to go on secondment, the head of the manpower department of the respondent, by a letter dated 9.11.1995 threatened to take disciplinary action against her for refusing to go on secondment. The appellant had no choice but to despatch the letter dated 2 December 1995 that she had been dismissed. The effect of the dismissal was immediate. The letter (p. 112 of the appeal record) read as follows:

Perbadanan Kemajuan Iktisad Negeri Kelantan
Jalan Tengku Maharani
Kota Bharu.

Dated: 2nd December, 1995

Ketua Eksekutif
Perbadanan Kemajuan Iktisad Negeri Kelantan
Jalan Tengku Maharani
15000 KOTA BHARU.

Dear Sir,

I refer to your letter Ref: PKINK: 130/5 Jld.2(68) dated 9th November, 1995 and my reply Ref: PKINK 130/1/186/Jld.1(6) dated 19th November, 1995.

As you are aware since the 9th November 1995, my life in PKINK has been made difficult by the following events:

(a) My application for leave to go to New Zealand which was approved on the 4th November, 1995 was withdrawn at the last minute vide your letter Ref: PKINK: 130/5/Jld.2(50) dated 12th November, 1995 which was delivered on the 13th November, 1995 (ie. one day before departure for New Zealand).

(b) On 16th November, 1995 *vide* your letter Ref: PKINK: Sulit: 130/1/186(11), I was ordered to vacate my room.

(c) On 18th November, 1995 my direct telephone line was cut off. Furthermore, I have not even been allowed to use the photostat machine nor given any office work to do.

(d) My November, 1995 salary which was usually paid before the end of each month has not been paid till today.

The events mentioned above clearly show that the relationship of mutual trust and confidence has been broken down as a result of PKINK's conduct towards me. PKINK's conduct in trying to "second" me to KELREST HOLDING BERHAD at a reduced remuneration (salary + allowances) is further proof of this.

Under these circumstances I have no alternative but to consider myself dismissed by PKINK with immediate effect.

Sgd.
(Hajah Rosneli Kundor)
Pengurus Kewangan
Perbadanan Kemajuan Iktisad Negeri Kelantan
Kota Bharu.

This letter apparently jolted the respondent and we are of the view that the respondent knew that they were in the wrong and to face the consequences. Instead of replying to this letter the respondent despatched a letter dated 4 December 1995 (p. 114 of the appeal record). The letter read:

> Puan Hjjh. Rosneli bt Kundor
> Lot 719 Jalan Tanjung 9
> Taman Tanjung Chat
> 15400 KOTA BHARU.
>
> Puan,
>
> PINJAMAN ANGGOTA PERBADANAN KEPADA
> KELREST HOLDINGS BERHAD
>
> Adalah saya dengan hormatnya merujuk kepada perkara di atas/
>
> Sukacita dimaklumkan bahawa surat pinjaman Puan ke KELREST HOLDINGS BERHAD, rujukan PKINK: 130/5 Jld 2(54) bertarikh 30 Okt 1995 dibatalkan.
>
> Sekian, terima kasih.
>
> 'MEMBANGUNAN BERSAMA ISLAM'
>
> Dengan hormatnya,
>
> Sgd.
> (WAN ZULKIFLE WAN YUSOFF)
> Ketua Eksekutif Kumpulan
> PERBADANAN KEMAJUAN IKTISAD
> NEGERI KELANTAN.

The appellant did not respond to this letter and did not report for work because by then the appellant had considered herself to have been dismissed. In our view, that was the right thing for the appellant to do. Had the appellant accepted and reported for work with the respondent as suggested by the learned trial judge, then she could not have considered herself to be dismissed on 2 December 1995. On that ground she could not institute the present action.

In his judgment, the learned trial judge took a dim view of the appellant's action of refusing to accept the offer and the fact that she took up the present action to be reinstated to her original post. With the greatest respect to the learned judge, we are not in agreement with him. In a constructive dismissal case such as this where there is no formal letter of dismissal by the employer, the employee has to establish that he has been constructively dismissed by the employer because of some unlawful actions by the employer which makes it

unbearable for him to continue working with the employer. The appellant in the present appeal had established that, when she refused to be seconded to another company as ordered by the respondent. The learned judge held it to be so to which we agree. By 2 December 1995 when the respondent refused to reinstate the appellant, she had considered herself to have been dismissed. The letter dated 4 December 1995 revoking the secondment which came after 2 December 1995 was of no avail because by then the appellant had been dismissed. If she had accepted the offer and returned to work after receiving the letter dated 4 December 1995 from the respondent, her claim for being dismissed could not be upheld.

Now, turning to the comments of the learned judge in respect of the pleadings as to why the appellant asked to be reinstated to the former post and that if she was still interested in the former post, why she did not accept the offer by the respondent of returning to work vide the letter dated 4 December 1995. With the greatest respect to the learned Judge, in a case of wrongful dismissal such as the present appeal, it is normal and usual for the aggrieved party to pray for an order that he be reinstated to the original post and rank with the same salary and benefits. Without this prayer then there is no justification for his claim to be wrongfully dismissed. This relief would be coupled with an alternative claim for damages in lieu of reinstatement. It is up to the court to decide which of the two reliefs to be given. The whole idea of asking for reinstatement to the original post is to justify that the dismissal was unlawful and that he is willing to work. For the above reasons we are of the view that the learned judge was in error in making the comments.

We find the learned judge was in error when he refused to grant the reliefs prayed for by the appellant after his finding that the appellant was unjustified in refusing to go on secondment to Kelrest. In our view, once there was such a finding, the court should have granted the reliefs sought by the appellant. In our view, the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 applies to the present appeal. In that case the appellant had risen in the service of the respondent company to the post of Personal and Industrial Relations Manager and had in that capacity successfully negotiated a new collective agreement with the trade union. The trouble started after he had taken steps to implement the award confirming the collective agreement. The appellant was told that he would be transferred to manage a cinema theatre belonging to the respondent. The appellant did not accept the transfer order as he regarded it as a breach of contract entitling him to hold the respondent company liable for dismissing him without just cause or excuse. On 31 May 1985, he wrote to the M.D. stating that he was not prepared to accept the transfer order and regarded the M.D's instructions as a breach of contract

entitling him to hold the respondent company liable for dismissing him without just cause or excuse. The M.D. replied, denying dismissing the appellant because his terms and conditions of service remained unaltered and further because the secondment to manage a cinema theatre was "a normal part of managerial exchange of staff between the cinemas and head office so as to promote a better understanding among office staff and the operational level cinema staff". On 1 June the appellant did not report for duty as instructed by the M.D. This prompted Mr. Cheah Kong Fatt, the Divisional Manager Cinema Operations to whom the appellant was required to report, to write two letters to the appellant regarding the appellant's refusal to accept the transfer order. The Supreme Court held that since the appellant has succeeded in showing that he was dismissed, it is for the respondent company to show that the dismissal was with a just cause or excuse. The finding of the Industrial Court pointed a strong indictment against the respondent company which it was unable to rebut. That being the case, the dismissal must be no other than that it was unjust and without excuse.

In our view, the facts in that case are similar to the present appeal. For the above reasons, we find that the appellant's dismissal on 2 December 1995 was unjust and without excuse.

For the above reasons, we allow the appeal with costs here and below. It is also clear to us the relationship between the appellant and the respondent had reached the state of unbearability. Furthermore, the appellant has found a new job. As such we will not order reinstatement but will award damages in lieu of reinstatement. The damages are to be assessed by the senior assistant registrar of the High Court, Kota Bharu until the date the appellant was gainfully employed.